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IN THE

Supreme Court of the United States

OCTOBER TERM 1967

No. 959

SAMUEL RESNICOFF,

Petitioner,

v.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, STATE OF NEW YORK

SAMUEL RESNICOFF,
Petitioner appearing pro se,
280 Broadway,
New York, N. Y. 10007.

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No. .....

SAMUEL RESNICOFF,

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v.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, STATE OF NEW YORK

Petitioner, appearing pro se, respectfully requests this Honorable Court to grant his petition for a writ of certiorari to review the decision of the Court of Appeals, State of New York.

Opinion Delivered in the Court Below to Be Reviewed

The opinion of the Appellate Division, First Department, which suspended petitioner from the practice of law for two years, is reported in 27 A. D. 2d 509, 280 N.Y.S. 2d 820, and appears in the appendix. There was no opinion by the Court of Appeals which stayed the order of suspension

pending an application by petitioner for leave to appeal to that court, and no opinion by the Court of Appeals which subsequently vacated its stay and denied the motion for leave to appeal.

Jurisdiction

Petitioner invokes the jurisdiction of this Court upon the ground that his rights under Amendments IV, V, VIII and XIV of the Constitution of the United States were violated. The jurisdiction of this Court to intercede is also warranted by Title 28, USC, 1257 (3).

The supervisory jurisdiction of this Court set forth in Rule 19 is justifiable because the decision by the Appellate Division is not only contrary to a number of decisions by this Court, but in addition raises a federal question of substance not heretofore determined by this Court.

Constitutional Provisions Involved

(1) AMENDMENT IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *."

(2) AMENDMENT V:

> "No person * * * nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law * * *."

(3) AMENDMENT VIII:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

(4) AMENDMENT XIV:

"Section 1. All persons * * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statutes Involved

(1) SECTION 11, OF THE CIVIL RIGHTS LAW (NEW YORK), provides as follows:

"FINES MUST BE REASONABLE AND IMPOSED ONLY FOR CAUSE

No citizen of this state ought to be fined or amerced without reasonable cause, and such fine or amercement should always be proportioned to the nature of the offense."

(2) ARTICLE 1, SECTION 5, NEW YORK STATE CONSTITUTION, provides:

"Excessive bail shall not be required nor excessive fines imposed, nor shall cruel and unusual punishments be inflicted * * *."

(3) ARTICLE 1, SECTION 6, NEW YORK STATE CONSTITUTION, provides:

"No person shall be deprived of life, liberty or property without due process of law."

(4) ARTICLE 1, SECTION 11, NEW YORK STATE CONSTITUTION, provides:

"No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his

civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state."

(5) SECTIONS 738 and 739, NEW YORK PENAL LAW; SECTIONS 813-a and 813-b, NEW YORK CODE OF CRIMINAL PROCEDURE, dealing with eavesdropping, and SECTION 4506, CPLR, which bars eavesdropping from being admissible in any civil action or proceeding, without a court order.

SECTION 738, PENAL LAW (NEW YORK), provides as follows:

"§ 738. EAVESDROPPING

A person:

1. not a sender or receiver of a telephone or telegraph communication who wilfully and by means of instrument overhears or records a telephone or telegraph communication, or who aids, authorizes, employs, procures or permits another to so do, without the consent of either a sender or receiver thereof; or

2. not present during a conversation or discussion who wilfully and by means of instrument overhears or records such conversation or discussion, or who aids, authorizes, employs, procures or permits another to so do, without the consent of a party to such conversation or discussion; or

3. who, not a member of a jury, records or listens to by means of instrument the deliberations of such jury or who aids, authorizes, employs, procures or permits another to so do; is guilty of eavesdropping."

SECTION 739, PENAL LAW (NEW YORK) provides as follows:

"§ 739. EXEMPTION.

There shall be exempt from the provisions of this article:

1. eavesdropping pursuant to an ex parte order granted pursuant to section eight hundred thirteen-a of the code of criminal procedure;

2. eavesdropping, as described in subdivision two of section seven hundred thirty-eight of this article, by a law enforcement officer pursuant to section eight hundred thirteen-b of the code of criminal procedure without an ex parte order obtained pursuant to section eight hundred thirteen-a of said code;

3. the normal operation of a telephone or telegraph corporation; and

4. the normal use of the services and facilities furnished by such corporation pursuant to its tariffs."

SECTION 813-a CODE OF CRIMINAL PROCEDURE (NEW YORK) provides as follows:

"§ 813-a. EX PARTE ORDER FOR EAVESDROPPING

An ex parte order for 'wiretapping' or 'mechanical overhearing of a conversation' as defined in subdivisions one and two of section 250.00 of the penal law may be issued by any justice of the supreme court or judge of a county court upon oath or affirmation of a district attorney, or of the attorney-general or of an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof, that there is reasonable ground to believe that evidence of crime may be thus obtained, and particularly describing the person or persons whose communications, conversations or discussions are to be overheard or recorded and the purpose thereof, and, in the case of a telegraphic or telephonic communica-

tion, identifying the particular telephone number or telegraph line involved. In connection with the issuance of such an order the justice or judge may examine on oath the applicant and any other witness he may produce and shall satisfy himself of the existence of reasonable grounds for the granting of such application. Any such order shall be effective for the time specified therein but not for a period of more than two months unless extended or renewed by the justice or judge who signed and issued the original order upon satisfying himself that such extension or renewal is in the public interest. Any such order together with the papers upon which the application was based, shall be delivered to and retained by the applicant as authority for the eavesdropping authorized therein. A true copy of such order shall at all times be retained in his possession by the judge or justice issuing the same, and, in the event of the denial of an application for such an order, a true copy of the papers upon which the application was based shall in like manner be retained by the judge or justice denying the same."

SECTION 813-b CODE OF CRIMINAL PROCEDURE (NEW YORK) provides as follows:

"§ 813-b. EAVESDROPPING BY LAW ENFORCEMENT OFFICERS WITHOUT COURT ORDER UNDER CERTAIN CIRCUMSTANCES

Orders for eavesdropping as set forth in section eight hundred thirteen-a of this code must be obtained before the eavesdropping commences, except as hereinafter in this section provided. A law enforcement officer may eavesdrop as described in subdivision two of section 250.00 of the penal law without a court order obtained pursuant to section eight hundred thirteen-a of this code only when he has reasonable grounds to believe (1) that evidence of crime may be

thus obtained, and (2) that in order to obtain such evidence time does not permit an application to be made for such a court order before such eavesdropping must commence. In any such case an application for a court order pursuant to section eight hundred thirteen-a of this code must be made within twenty-four hours after such eavesdropping commenced. In computing said twenty-four hour period legal holidays shall not be considered. The application for such a court order must contain, in addition to the requirements set forth in section eight hundred thirteen-a of this code, the time when such eavesdropping commenced. If such application is granted, the order shall be made effective from the time the eavesdropping commenced. If the application is denied, the eavesdropping must cease immediately. Any violation of this section, shall be a felony punishable by imprisonment for not more than two years."

SECTION 4506, CPLR, provides:

"§ 4506. Eavesdropping evidence. Evidence obtained by any act of eavesdropping, as defined in section 250.05 of the penal law, or by any act in violation of section eight hundred thirteen-b of the code of criminal procedure, or by eavesdropping without court order, as permitted by said section of the code of criminal procedure, when an application for such order is thereafter made as required by said section but is denied, and evidence obtained through or resulting from information obtained by any such act, shall be inadmissible for any purpose in any civil or criminal action, proceeding or hearing; provided, however, that any such evidence shall be admissible in any civil or criminal action, proceeding or hearing against the person who has, or is alleged to have, violated section 250.05 of the penal law or section eight hundred thirteen-b of the code of criminal procedure."

Questions Presented for Review

1. Was the seizure of petitioner's privileged and confidential file taken from his office by detectives of the District Attorney's office without a warrant and without court order and used against him at the disciplinary hearing, in violation of his rights under the Fourth Amendment of the United States Constitution?

2. Was petitioner deprived of his property without due process of law in violation of the Fifth and Fourteenth Amendments of the United States Constitution?

3. Was the introduction of the minifon recording at the reopened (disciplinary) hearing in violation of the Fifth Amendment of the United States Constitution since petitioner was compelled to be a witness against himself?

4. Was petitioner denied due process and the equal protection of the laws as mandated by the New York State Constitution and the pertinent New York State Statutes, in view of the fact that his rights were violated by the introduction of tainted and incompetent evidence at the disciplinary hearing?

5. Was the two years' suspension of petitioner, a practicing attorney since 1933 (except for his military service), cruel and unusual punishment, prohibited by the Eighth Amendment of the Constitution of the United States?

6. In imposing the two years' suspension, the Appellate Division held that its decision in *Matter of Levy*, 22 A. D. 2d 556 was applicable. Since the Appellate

Division in *Matter of Levy, supra,* imposed a six months' suspension based upon a similar misdemeanor plea (misconduct), was its action in imposing a two years' suspension on petitioner for his similar misdemeanor plea (misconduct) in violation of his constitutional rights under the Fourteenth Amendment in that he was denied due process and the equal protection of the laws?

Statement and reasons for Granting the Writ

Petitioner, an honorably discharged veteran of World War II, was admitted to practice in the Second Department (Kings County), State of New York, on April 5, 1933. As a single practitioner, petitioner maintained an office in the Borough of Manhattan (First Department) until September 7, 1941, at which time he commenced military service. Upon completion of his military service which included two years of overseas duty in a combat area in the Southwest Pacific, petitioner was honorably discharged. From 1945 to 1960, petitioner "rendered gratuitous advisory service for veterans with civil service problems".

Throughout the years of his practice, many organizations, the Legal Aid Society, Veterans' Organizations and the N.A.A.C.P., repeatedly called upon petitioner for guidance and advice, which he always supplied gratuitously.

The controversy herein stems from *one* client named John Boyer. The latter was recommended to petitioner by former Supreme Court Justice Joseph A. McKinney. Boyer had passed a written competitive examination for Fireman. Although marked certified by the local New York City Civil Service Commission, the Fire Department rejected him on medical grounds. After a joint medical examination, he was again marked qualified by the Com-

mission. Nevertheless, the Fire Department, contrary to the rules and regulations of the Commission, refused to appoint him.

Petitioner, on November 30, 1960, instituted a proceeding on behalf of Boyer. The proceeding was argued in the Supreme Court, New York County. On March 30, 1961, the Judge, in lieu of directing appointment, remanded the proceeding to the Fire Department for "further earnest consideration" with a possible view of appointment. The Fire Department, however, took no action on the remand.

The eligible list containing Boyer's name was soon to expire. Rather than hazard another examination, Boyer made every possible effort to get himself appointed from the existing eligible list. Beginning with April of 1961, up to and including September 5, 1961, there were many conferences with Boyer at petitioner's office and many telephone conversations. Boyer did not pay any additional fees to petitioner. On August 30, 1961, Boyer came to see petitioner at his office. Concealed on his person was a tape recorder which had been supplied by an Assistant District Attorney. *A court order for the eavesdropping had not been obtained,* as required by Sections 738 and 739 of the New York State Penal Law, and Sections 813-a and 813-b of the New York Code of Criminal Procedure.

On September 5, 1961, two detectives and an investigator from the District Attorney's office without a warrant, stormed into petitioner's office; seized the Boyer file over objection of petitioner, and instructed petitioner to accompany them to the District Attorney's office, at which time petitioner was arrested. The criminal matter was on the calendar approximately twenty-three times and was handled by six Assistant District Attorneys. On June 10, 1964, petitioner pleaded guilty to the misdemeanor charge of misconduct.

Petitioner never heard the full recording of the taped conversation. The tape was not played at the criminal trial. Whether the plea was hastily made or ill-advised is admittedly of no consequence at this juncture.

The disciplinary proceeding against petitioner was commenced on February 18, 1966, and was adjourned to March 7, 1966. On March 7, 1966, both sides rested after a full and fair opportunity to present all facts, records, documents and testimony. Respondent had in its possession the transcript of the recorded conversation between petitioner and his client Boyer which took place in petitioner's office on August 30, 1961. However, respondent did not offer the transcript in evidence at said hearings.

The Referee filed his report on April 1, 1966. *Six weeks later,* respondent, dissatisfied with said report, made a formal application to reopen the hearing. Petitioner opposed the application. Although the hearing was closed for all purposes, the Appellate Division nevertheless, granted the request. On November 14, 1966, the hearing was reopened. Petitioner preserved his objection by noting same in the record. The Referee in response stated:

> "Mr. Trosk: I take it, Mr. Resnicoff, that if this is offered as any reason why we shouldn't proceed here the place to which it should have been addressed was the Appellate Division when the application was made to reopen. Inasmuch as the Appellate Division has made an order reopening it I have no discretion to go into the wisdom of whether or not we are to hold another hearing."

At the reopened hearing, respondent then introduced in evidence a transcript of the taped recorded conversation between petitioner and Boyer held on August 30, 1961. This eavesdropping evidence was not only in violation of petitioner's constitutional rights, but constituted serious

and prejudcial error (*Section 4506, CPLR). At said reopened hearing, respondent did not introduce any newly discovered evidence. It had that evidence (minifon recording) in its possession at all times. Since respondent (like petitioner) had rested, the Appellate Division to the prejudice of petitioner, extended preferential treatment to respondent.

It might not be amiss to point out that in the First Department (comprising New York and Bronx Counties), the Appellate Division designates attorneys to sit as Referees in disciplinary hearings. In the Second Department (Kings, Queens, Nassau, Suffolk and Westchester Counties), the Appellate Division designates a Justice of the Supreme Court to preside at disciplinary hearings. The practice is not uniform throughout the State.

At the hearing, a number of sitting Judges, the District Attorney of Kings County, the State Administrator of the Judicial Conference of the State of New York, and a large number of prominent public officials testified on behalf of petitioner. In his Report to the Appellate Division, the Referee stated:

> "Respondent has had a long, active and, until the incident here involved, unsullied career at the Bar and as appears from the views expressed by witnesses and in letters, he is highly regarded by both the Bench and his colleagues in the profession for his ability and integrity."

In imposing the two years' suspension upon petitioner herein, the Appellate Division held that its decision in *Matter of Levy*, 22 A. D. 2d 556, was applicable. In said *Levy* case, the Appellate Division imposed a six months' suspension. Since the same Court in *Levy* imposed a six

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* Section 4506, CPLR, bars eavesdropping evidence without a court order in any civil proceeding or hearing.

months' suspension based upon a misdemeanor plea (misconduct), its action in imposing a two years' suspension on petitioner for a similar misdemeanor plea (misconduct), was in violation of petitioner's constitutional rights, in that he was denied due process and the equal protection of the laws. The attempt on the part of respondent before the New York State Court of Appeals to justify the six months' suspension imposed upon Mr. Levy because the latter had suffered a heart attack, was not a legal basis to justify an additional one year and six months' suspension imposed upon petitioner. The additional punishment was contrary to Amendment 14 of the Constitution of the United States, which provides:

> "* * * nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

There is no legal or rational basis to justify the severe penalty meted out to petitioner. The principle of "like penalties for like offenses" was completely disregarded; was discriminatory, and operated to the immediate prejudice, damage and detriment of petitioner. The disparity between the two suspensions for the same misdemeanor plea is too enormous for comprehension.

Where procedural rights have been violated; where the disciplinary hearing was not conducted in accordance with rules of evidence; where substantial legal and constitutional rights have been violated; and where prejudicial error has been committed in the reception of evidence or testimony, this honorable Court not only assumed jurisdiction but corrected the errors (*Spevack* v. *Klein*, 385 U. S. 511, 87 S. Ct. 625, and *Zuckerman* v. *Greason*, 386 U. S. 15, 87 S. Ct. 847).

Disciplinary proceedings against attorneys have long been recognized as adversary hearings. All the rules of

evidence apply. An attorney is not a second-rate citizen. In *Spevack, supra,* this Court held:

> "It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."

Furthermore, the Appellate Division has repeatedly held that in a disciplinary proceeding it was not concerned with meting out punishment, because the prime issues were "moral fitness" and whether the attorney was incapable or unwilling to distinguish right from wrong (*In re Samuels,* 22 A. D. 2d 564; *Matter of Gould,* 4 A. D. 2d 174; *In re Portnick,* 5 A. D. 2d 16, and *In re Zaslav,* 21 A. D. 2d 243, 250 N.Y.S. 2d 334). A disciplinary proceeding is not punishment for any breach committed (*In re Nearing,* 16 A. D. 2d 516, 229 N.Y.S. 2d 567). Yet, the same court in suspending petitioner for two years imposed punishment which was cruel and punitive, and contrary to its previous holdings. Here again, the principle of equal protection of the laws was disregarded.

The introduction of the transcript of the minifon recording at the reopened hearing which recorded the conversation between petitioner and his client Boyer at petitioner's office on August 30, 1961, and which was accomplished *without a court order* (a trespassory eavesdrop); was in violation of petitioner's constitutional rights (*Berger* v. *State of New York,* 388 U. S. 41, 87 S. Ct. 1873; *Mapp* v. *Ohio,* 367 U. S. 643, and *People* v. *Grossman,* 20 N. Y. 2d 346). Petitioner's rights under due process were violated (*Spevack* v. *Klein, supra*).

It is a fundamental principle that no one "goes outside the record". This principle applies equally to bench and bar. In its opinion suspending petitioner, the Appellate Division held:

> "* * * and put the city to an unnecessary expense incident to its investigation of the matter reported by respondent's client."

There was no such evidence in the record. There were four hearings before the Referee. No mention was made at any time of any investigation or of any expense. No such offer of proof was made. Neither was any request made by respondent for the Referee to take judicial notice of any investigation or any expense in connection therewith. There is no reference of any kind in the record to any investigation. Petitioner is unaware of any investigation. The issue appeared for the *first time* in the *per curiam* opinion of the Appellate Division. The Appellate Division was in error. It went outside the record. Since the issue of "expense and investigation" were factors considered by that court in arriving at the two years' suspension, it operated to petitioner's prejudice, was improper, and affected a substantial right. The Appellate Division improperly and erroneously considered evidence which was dehors the record.

The two years' suspension imposed upon petitioner was grossly excessive as a matter of law and violated Amendment VIII of the Federal Constitution. The reopened hearing which paved the way for respondent to introduce the eavesdropping and the recorded conversation which was accomplished without a court order, violated Amendments V and XIV of the United States Federal Constitution. The state procedure was wanting in due process of law and the proof was insufficient.

On July 7, 1967, the Court of Appeals, State of New York, stayed the order of suspension pending the hearing and determination of petitioner's motion for leave to appeal. On September 28, 1967, the Court of Appeals without opinion, vacated the stay which it previously granted and denied the motion for leave to appeal.

Petitioner then made an application to this Court for an order staying his suspension for a reasonable time to enable him to make an application for a writ of certiorari. The application was denied by Mr. Justice HARLAN on October 23, 1967.

Since the Court of Appeals, State of New York, vacated the stay which it previously granted and denied the motion for leave to appeal, petitioner has exhausted all remedies and all appeals within the State of New York. Petitioner has no other remedy but to apply to this Honorable Court for the relief requested herein.

Petitioner has been denied due process. The essence of the right to equal protection of the laws is that all persons similarly situated be treated alike. This basic and fundamental principle of constitutional law was overlooked by the Appellate Division. Additionally, the trespassory invasion (electronic eavesdropping, etc.), which was perpetrated against petitioner, was only recently interred by this Court in the graveyard of unconstitutionality.

Conclusion

This Court should assume jurisdiction and grant the petition for a writ of certiorari for the following reasons:

1) The seizure of petitioner's file which was taken from his office without a warrant and subsequently used against him at the reopened (disciplinary) hearing was in violation of his constitutional rights;

2) The introduction of the minifon recording at the reopened disciplinary hearing which recorded the conversation between petitioner and his client Boyer on August 30, 1961, at petitioner's office without a court order, was not only in violation of Article 1, Sections 5, 6 and 11 of the New York State Constitution; Sections 738 and 739 New York Penal Law; Sections 813-a and 813-b New York Code of Criminal Procedure; and Section 4506 CPLR, but was also in violation of petitioner's rights under Amendments 4, 5 and 14 of the Federal Constitution;

3) The two years' suspension imposed upon petitioner for a misdemeanor plea which was similar to the

plea taken in the case of *Matter of Levy, supra*, cited by the Appellate Division, and which only resulted in a six months' suspension, violated the due process clause of the Fourteenth Amendment of the United States Constitution, in that petitioner was denied the "equal protection of the laws."

4) Since the misdemeanor misconduct related to a $500 suggestion by petitioner which (as the Appellate Division pointed out in its opinion) was not adopted by the client,—the imposition of a two years' suspension which will result in extreme hardship and a substantial loss of income to petitioner, constituted cruel and unusual punishment prohibited by the Eighth Amendment of the Federal Constitution, and was totally disproportionate to the offense.

WHEREFORE, petitioner respectfully prays that this Honorable Court grant the petition for a writ of certiorari; vacate the order of suspension, and remand the proceeding to the Appellate Division of the Supreme Court of New York, First Judicial Department, for reconsideration in the light of *Berger* v. *State of New York*, 388 U. S. 41, *Spevack* v. *Klein*, 385 U. S. 511, and *Kaye* v. *Association of the Bar of the City of New York*, 386 U. S. 17.

Dated: New York, December 20, 1967.

Respectfully submitted,

SAMUEL RESNICOFF,
Petitioner appearing pro se.

APPENDIX

Decision of the Appellate Division.

SUPREME COURT,
APPELLATE DIVISION—FIRST DEPARTMENT,
April, 1967.

Bernard Botein, P. J.,
Louis J. Capozzoli,
Benjamin J. Rabin,
James B. M. McNally,
Owen McGivern, JJ.

Motion No. 1603

April 14, 1967

In the Matter

of

Samuel Resnicoff,

an Attorney.

Disciplinary proceedings instituted by The Association of the Bar of the City of New York. Respondent was admitted to the Bar on April 5, 1933, at a Term of the Appellate Division of the Supreme Court in the Second Judicial Department. By order entered November 30, 1965, George Trosk, Esq., was appointed Referee to take testimony and report to this Court.

John G. Bonomi (Robert F. Condon with him on the brief), attorney for petitioner The Association of the Bar of the City of New York.

Samuel Resnicoff, respondent pro se.

Per Curiam:

Respondent was admitted to practice in the Second Judicial Department on April 5, 1933.

On June 10, 1964, in the Supreme Court, New York County respondent pleaded guilty to the crime of misconduct by an attorney, a misdemeanor, in violation of Section 273 of the Penal Law of the State of New York. The indictment, to which the plea was taken, charged that respondent in May of 1961 sought to obtain the sum of $500 from a client by falsely representing that the money would be paid to someone in the New York City Fire Department so as to insure the client's appointment as a probationary fireman. The suggestion was not adopted by the client, and he eventually was appointed to the Fire Department.

The record supports the Referee's conclusion that petitioner's charges of professional misconduct have been sustained, and the report of the Referee is in all respects confirmed.

The respondent is 57 years old. He served in the U. S. Army, September 7, 1942 to December 5, 1945, two years of which were in a combat area in the Southwest Pacific, and was honorably discharged. Numerous character witnesses seven of whom are sitting Justices in our courts, and another twelve of whom hold high public office, have testified to respondent's good character and reputation. Indeed, it seems to be true that other than the transgression before us there seems to be no record and no suggestion of any prior misconduct. As was stated by the Referee "Repondent has had a long, active and, until the incident here involved, an unsullied career at the Bar and, as appears from the views expressed by witnesses and in letters, he is highly regarded by both the Bench and his colleagues in the profession for his ability and integrity."

Notwithstanding, the infraction before us was one that violated the high standards of conduct required of attorneys. It was an affront to the integrity and prestige of

the Bar. Further, it impugned the Fire Department, and put the city to an unnecessary expense incident to its investigation of the matter reported by respondent's client.

We are therefore in agreement with petitioner that respondent should be severely disciplined. Disciplinary proceedings involving much the same offense have resulted in disbarment. *Matter of Ruby*, 22 A D 2d 547. An ameliorative distinction may be made here however, as was made in *Matter of Levy*, 22 A D 2d 556, wherein the respondent admitted his wrong and pleaded guilty in the Supreme Court, New York County. Censurable as was respondent's conduct herein, it may commend itself to a disposition dissimilar to Ruby. The respondent herein also pleaded guilty in the Supreme Court, New York County, and on the whole, with a contrite spirit, has cooperated with the disciplinary authorities. Contrariwise, in *Ruby*, wherein the respondent persisted in a perverse and fantastic course of prevarication to the Bar Association, to the Grand Jury and to the Referee.

Nor are we unmindful, in meting out a lesser sanction than perhaps the gravity of the offense merits, that we are here considering a single instance of wrongdoing and not a course of conduct; that the respondent has had a prior blameless career, has exhibited deep remorse and has been under this cloud since 1961, the time of his arrest. In view of all the circumstances, we feel that a suspension for two years would be appropriate.

Respondent should be suspended for two years.

All concur.

BRIEF IN OPPOSI-TION TO PETITION FOR A WRIT OF CERTIORARI

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THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

RESPONDENT'S BRIEF IN OPPOSITION

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United States Constitution:

Fifth Amendment 7

Statute:

Penal Law of the State of New York:

Section 273 2

Section 738(2) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 959

SAMUEL RESNICOFF,

Petitioner,

—v.—

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

RESPONDENT'S BRIEF IN OPPOSITION

Preliminary Statement

Although the petition requests that a writ of certiorari be directed to the Court of Appeals of the State of New York, it, in substance, seeks review of an order of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department (hereinafter referred to as "the Appellate Division"), made and entered on June 15, 1967, suspending petitioner* for a period of two years, effective July 14, 1967, and until further order of that

* Petitioner here was the respondent below and respondent here was petitioner below.

Court. The opinion of the Court is officially reported at 27 A. D. 2d 509. On September 28, 1967, the Court of Appeals of the State of New York denied petitioner's motion for leave to appeal and vacated an interim stay of the order of suspension granted pending its determination of that motion.

Statement of the Case

This is a disciplinary proceeding brought by respondent against petitioner. It was instituted by service of a petition on or about April 20, 1965, charging that petitioner was convicted, on or about June 10, 1964, upon his plea of guilty to the crime of Misconduct by an Attorney in violation of Section 273 of the Penal Law of the State of New York, and that petitioner had thereby admitted having attempted to obtain the sum of $500 from a client upon the false representation that it would be used to pay an employee of the Fire Department of the City of New York to use his influence to have the client appointed as a probationary fireman.

On February 18, 1966, a hearing was commenced before a Referee appointed by the Appellate Division. Petitioner appeared as a witness on his own behalf and, after admitting the fact of his plea of guilty, proceeded to give testimony to establish his innocence of the underlying criminal conduct (R. 31-99).* As a consequence, whether or not petitioner, despite his plea, was, in fact, guilty of the underlying conduct charged in the indictment became an issue in the disciplinary proceeding (R. 94-99). The hearing was adjourned to March 7, 1966, for the purpose of adducing

* "R" references are to the pages of the transcript of the Referee's hearing.

proof with respect to this issue, including the testimony of a witness to whom petitioner had referred but whose identity he had refused to disclose upon the representation that he would produce him at the next hearing (R. 93-4).

In the period between hearings, petitioner communicated with counsel for respondent and indicated a desire to withdraw that part of his testimony which had tended to place in issue his actual guilt of the underlying charge. Consequently, at the reconvened hearing of March 7, 1966, petitioner stated for the record that by his plea of guilty he had admitted the basic elements constituting the crime and requested that his contrary testimony at pages 31 to 99 of the record be disregarded (R. 105-6). In light of that statement, no further evidence was adduced by either petitioner or respondent. Nevertheless, the Referee subsequently filed a report in which he referred to petitioner's exculpatory testimony at the first hearing, noted that respondent had not called petitioner's client to testify and had not offered any explanation for failing to do so, and concluded by accepting petitioner's testimony that he had pleaded guilty, although not aware at the time that his conduct had been improper, because he was inexperienced in criminal law (Report pp. 8-10).

Following the filing of the Referee's report, respondent moved to reopen the hearings upon the ground that the Referee had misunderstood petitioner's statement at the hearing of March 7, 1966, withdrawing any testimony which had raised any issue concerning the fact of his guilt, in reliance upon which respondent had not adduced any testimony with respect to the issue although it was readily available. Consequently, respondent pointed out, the Referee's report did not reflect the truth concerning petitioner's

misconduct. The motion to reopen the hearings was granted and a further hearing was held on November 4, 1966.

Respondent appeared at the reopened hearing prepared to call witnesses to establish petitioner's guilt (R. 122). Before any witness was called, however, petitioner consented to the introduction in evidence of a transcript of a minifon recording (and stipulated its accuracy) made by the client of the conversation in which petitioner had sought to obtain the sum of $500 upon the false representation that it would be used to pay an employee of the New York City Fire Department to influence him to obtain the client's appointment as a probationary fireman (R. 121). In light thereof, it was agreed that there was no necessity to call witnesses (R. 122).

The Referee thereafter filed a supplemental report in which, on the basis of the transcript of the recorded conversation, he concluded that petitioner's testimony at the original hearing disputing his actual guilt was not true (Supp. Report p. 5).

Respondent thereafter moved to confirm the Referee's reports. Petitioner submitted a brief with respect thereto in which he emphasized mitigating circumstances and requested leniency. Not a single one of the questions here presented was raised at that time. By order entered June 15, 1967, the Appellate Division suspended petitioner for a period of two years, effective July 14, 1967, and until further order of the Court.

ARGUMENT

I.

The minifon recording was received in evidence upon consent, petitioner raised no objection thereto at any time in the court below, and the recording was, in any event, properly admissible.

The transcript of the minifon recording was received in evidence at the hearing of November 4, 1966, after petitioner had conceded its accuracy and had specifically stated that he had no objection to its admission (R. 121). When respondent moved to confirm the Referee's reports, petitioner not only raised no objection to the introduction in evidence of the recording but, in the brief submitted by him with respect to the motion, categorically stated, referring to the recording, that "substantive, constitutional and legal objections could have been interposed. Issues of authenticity, accuracy, etc., could have been raised, which of necessity would have required lengthy and protracted hearings. However, [petitioner], cooperating with [respondent], stipulated that the transcript was a fair representation. His emphasis was upon his responsibility rather than his defenses again evidencing his contriteness". (App. Div. Br. p. 10). Petitioner having thus concededly not raised any objection to the recording, and having sought to gain some favorable consideration thereby, cannot now, it is respectfully submitted, be permitted to raise the very claims he had previously abandoned.

Petitioner's only reference to the alleged inadmissibility of the recording in the brief submitted by him to the Court

of Appeals in support of his motion for leave to appeal, is contained in one paragraph inserted under a point heading having nothing to do therewith, (Court of Appeals Br. p. 13). The thrust of petitioner's argument in that portion of the brief contended that the Appellate Division had improperly granted respondent's motion to reopen the hearings, an act so clearly within the discretion of that Court that petitioner does not even include it in the questions presented upon the present petition for a writ of certiorari.

Even if petitioner had timely raised an objection to the admissibility of the recording so that he could now press it, it is totally without merit. The thrust of petitioner's argument on this point is that the recording was obtained in violation of the New York eavesdropping statutes. The text of the relevant statutes are reproduced as part of the petition (Pet. pp. 4-7). The critical provision is Section 738 (2) of the New York Penal Law which defines eavesdropping of a conversation such as that between petitioner and his client, the recording of which petitioner now attacks. That section proscribes as eavesdropping the overhearing or recording of a conversation by one not present without the consent of the parties to such conversation. Since the conversation in question took place between petitioner and his client, and it was the client who carried the recording device, no eavesdropping within the meaning of the New York law occurred and, consequently, all of the other statutes cited by petitioner which deal solely with eavesdropping as defined in Section 738 are irrelevant.

Petitioner further contends that the recording violated his constitutional rights, relying principally upon *Berger* v. *State of New York,* 388 U. S. 41. In that case, however,

conversations were recorded without the knowledge, much less the consent, of any of the participants. As noted by Mr. Justice White in a footnote to his concurring opinion in *Katz* v. *United States,* —— U. S. ——, 36 L. W. 4080, 4084, decided December 18, 1967, the *Berger* decision did not apply to the admissibility in evidence of conversations recorded by one of the participants.

Nor was petitioner's Fifth Amendment right not to incriminate himself violated. The recorded conversation with the client was entirely voluntary. As this Court has held, there can be no violation of the Fifth Amendment prohibition against compulsory self-incrimination without coercion, *Hoffa* v. *United States,* 385 U. S. 293, 303-4. Moreover, the recording was used in this proceeding to prove a charge of professional misconduct, a proceeding which is civil rather than criminal in nature, *Ex Parte Wall,* 105 U. S. 265, 288, and therefore, not within the scope of the privilege.

II.

Suspending petitioner from the practice of law for a period of two years for seeking to obtain monies from a client by falsely representing that it would be used to influence an official of local government did not constitute cruel and unusual punishment.

It is respectfully submitted that a court would be fully justified in disbarring an attorney who had been guilty of seeking to obtain monies from a client by falsely representing that it would be used to influence the action of a public official. The imposition of any discipline less than disbarment is an act of judicial grace.

Petitioner nevertheless contends that the two-year suspension which he received was an act of discrimination, relying principally upon *Matter of Levy,* 22 A. D. 2d 556, in which the Appellate Division suspended an attorney convicted for a similar crime for a period of six months. While we respectfully submit that a court must in any event have substantial latitude to discipline each of its officers found guilty of misconduct, the following facts distinguish *Levy* from petitioner so as to amply justify the difference in discipline imposed:

1. In *Levy,* the Court relied upon his "commendable candor and frank admissions of misconduct". Petitioner here, as the Referee noted, first gave false exculpatory testimony under oath (Supp. Report p. 5).

2. In *Levy,* the Court noted that in the period between indictment and conviction, the attorney had had a cardiac episode effectively suspending him from the practice of law for a period of 18 months. Petitioner here, so far as the record shows, practiced law continuously from the time of his indictment until the entry of the order of suspension.

3. In *Levy,* the Court noted that the attorney's representations to the client were made to expedite and induce the payment of the fee which the client had agreed to pay and that the sum requested did not exceed this agreed upon fee. Petitioner here had been paid his entire fee before he made the misrepresentation to his client and, consequently, the entire sum improperly demanded exceeded the agreed upon fee.

The distinction in the discipline imposed upon petitioner and that imposed in *Levy* was not an afterthought. Thus,

in deciding *Levy*, the Appellate Division specifically warned that absent the mitigating factors there present, "the discipline would be more severe". Moreover, on the same day it decided *Levy*, the Appellate Division decided *Matter of Ruby*, 22 A. D. 2d 547, in which it disbarred an attorney who, although not indicted or convicted, had 1) attempted to obtain the sum of $250 from a client over and above the agreed upon fee upon the false representation that it would be used to bribe an "advisor" to the judge who was to sentence the client in order to obtain a suspended sentence; and 2) thereafter, persisted in falsely denying his guilt in testimony before a Grand Jury and the Committee on Grievances.

III.

Petitioner's remaining contentions lack substance.

Petitioner alleges that prior to his indictment the file concerning his client was improperly seized by law enforcement authorities and was subsequently used against him at the reopened hearing in this proceeding (Pet. p. 16). Although the attorney who represented respondent at the hearings is no longer employed by it, examination of the transcript of the reopened hearings does not even reveal a reference to petitioner's file.

Petitioner also contends that the Appellate Division went outside the record when it referred, in its decision imposing the suspension, to the unnecessary expense which petitioner's conduct had required of the City of New York in investigating the matter reported by petitioner's client. Petitioner contends that there is not even any reference to any investigation in the record. To the contrary, it was

petitioner himself who disclosed to the Referee at the very first hearing that his client had made a complaint to the District Attorney's office; that the client had appeared at his office on August 30, 1961, with a recording device concealed on his person furnished by the District Attorney's office; that he was thereafter taken to the District Attorney's office by two detectives and an investigator; and that he was subsequently arrested (R. 10-12).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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